STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 20, 2014
v	Nos. 313954; 313955; 313956 Wayne Circuit Court
VERNON EDWARD LAW, Defendant-Appellant.	LC Nos. 12-005019-FC; 12-003566-FC; 12-005476-FC

Before: GLEICHER, P.J., and BORRELLO and SERVITTO, JJ.

PER CURIAM.

In these consolidated appeals, defendant appeals as of right his jury trial convictions of three counts of armed robbery, MCL 750.529, one count of assault with intent to do great bodily harm less than murder, MCL 750.84, and two counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant to 210 to 420 months imprisonment for the first conviction of armed robbery, 81 to 120 months for the second conviction of armed robbery, and 81 to 135 months for the third conviction of armed robbery. The trial court sentenced defendant to 210 to 420 months imprisonment for the assault conviction and two years' imprisonment for each of the felony firearm convictions. For the reasons set forth in this opinion, we affirm.

I. BACKGROUND

Defendant's convictions arise from three armed robberies that occurred on February 2, 2012. Defendant was convicted and sentenced as set forth above and he filed a claim of appeal. Subsequently, defendant filed a motion in this Court to remand for a *Ginther*[1] hearing, arguing that attorneys Kristine Longstreet and Robert Slameka rendered ineffective assistance when they failed to advise him of plea offers. This Court granted defendant's motion. *People v Law*, unpublished order of the Court of Appeals, entered June 19, 2013 (Docket Nos. 313954, 313955, 313956).

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

On remand, the trial court held a *Ginther* hearing. At the hearing, Longstreet testified that she represented defendant from the preliminary examination until the final conference. She withdrew her representation of defendant because defendant retained Slameka. During her representation of defendant, there was a plea offer from the prosecution, but she could not recall the specifics of the offer. She did not have "any specific independent recollection of informing" defendant of the plea offer, but stated "there would be no reason for me not to" inform defendant of the offer.

Sarah DeYoung, the assistant prosecutor in defendant's cases, testified that she spoke with Longstreet and "indicated to her that she should let me know if she's interested in an offer and I'll put something together." Longstreet informed DeYoung that defendant was not interested in a plea offer. DeYoung later spoke with Slameka "three to seven times" and a majority of those times involved discussions of a plea offer. DeYoung informed Slameka that there were three cases, that the guidelines would be difficult to score, and that her estimation of a possible plea would be 10 years' imprisonment. DeYoung could not recall whether the 10 years' imprisonment would include two years' imprisonment for the felony-firearm convictions or if it would be for a total of 12 years' imprisonment. She did not recall Slameka's response to her regarding defendant's interest in a plea offer, but acknowledged that no firm offer was made. She did not recall whether she had a firm sentencing guidelines range set before sentencing.

Slameka testified that he spoke with DeYoung twice and that she made a plea offer, but could not recall the specifics of the offer. The offer included a sentencing agreement, but Slameka could not recall the details of the sentencing agreement. Slameka explained why he did not have further discussions with defendant about the offer:

> Because he was sitting there during the offer and he told me under no circumstances would an innocent person plead guilty. We sat right outside this courtroom on the bench, I had the file in front of me, he sat right next to me. Told me that more than once.
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> * * *
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> After he told me under no circumstances was he going to plead guilty, that conversation ended. We did not discuss guidelines, we did not discuss anything other than him going to trial because he was a totally innocent man. He told me that repeatedly, sir.
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> * * *
>
> He sat there and listened to the plea offer and he told me, I am not, under any circumstances, going to plead guilty.

Defendant denied Slameka's testimony that he was present in the hallway when DeYoung made a plea offer to him and Slameka. Defendant testified that neither Slameka, Longstreet, nor DeYoung ever told him of a plea offer:

> Ms. Longstreet, when we had met one time down town [sic], because I was on GPS tether, 24 hour surveillance, your Honor served me with a bond with

> curfew from seven to seven, when I came down town [sic], Ms. Longstreet never discussed with me a plea offer. She asked me was I willing to accept an offer. I told her yes. I was present with some family at that time and I told her yes.
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> * * *
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> After I was released from Wayne County, that's when Robert Slameka was appointed to me after I had terminated my services with Kristine Longstreet. The conversation that he claims that he took place never happened. I was never contacted by phone or by mail, something as simple as that, by Mr. Slameka. If I had known of any sentencing guidelines or a plea deal, I would have gotten back with him immediately.

Defendant testified that he was not aware of his sentencing guidelines until after he was convicted. He became aware of the guidelines when he was in the law library during imprisonment and a "legal writer" helped him understand how to score the guidelines. Defendant would have accepted the plea offer to which DeYoung testified had he known there was an offer and the extent of the guidelines. Defendant further denied that he told Slameka that he was an innocent man and that he would not accept a plea deal. Defendant later testified that he did not learn of a plea deal until the second day of trial "when I looked over at my attorney and asked him, you mean to tell me they didn't offer a plea. He tells me, yes, Mr. Law, but I couldn't get ahold [sic] of you." Defendant also testified that Slameka told him the offer had expired. Defendant would have accepted the plea deal had he learned of it before it expired. Defendant told his "baby girl" that his guidelines were so low, that he was not going to get life, and that he would be "damned if [he was sentenced to] anymore than three." Defendant contended that a "dep" told him that his sentencing guidelines range was low, but later learned that his statement was false.

The trial court held that defendant was not denied the effective assistance of counsel, stating:

> The case was remanded to me for an evidentiary hearing and I'm to make findings of fact. Obviously, the first fact is that the Defendant was convicted of several counts of armed robbery and one very serious assault case. The assault that took place at the party store, the Defendant already had the money, by the testimony of both the witness who survived the beating, and by the video that captured the event, and he still struck him severally with a hard metal object.
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> Two, the Defendant was represented by a licensed and competent counsel.
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> Three, an elaborate and very incredible defense was made out on his behalf at his trial, which leads me to the conclusion inescapably, he wasn't going to plead guilty, he wanted to try this defense out on twelve people who rejected the defense. It wasn't alibi, it was I didn't need the money that I'm supposed to have stolen because my sister loaned me $4000 [sic] to pay my back rent, which was the event in his life that triggered all of this action that resulted in the armed robberies.

> I find further that the Defendant is lying. He's simply not credible and that the lawyers' representation to me, Mr. Slameka's representation to me that he, the Defendant, was an innocent man and wasn't going to plead guilty to anything I find to be a true statement. It's without a doubt he wanted to try this defense that either he, the family or the family alone had concocted.
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> Finally, I find that there was no incompetence of counsel. It's clear and beyond belief or beyond peradventure in this Court, that any advice about a plea offer would have been rejected by him, so convinced was he that if he was going to be convicted receive minimal time.
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> Therefore, the matter is concluded before me, the evidentiary hearing is over. I find that the Defendant's attorney was not incompetent and the case is back to the Michigan Court of Appeals. . . .

II. ANALYSIS

Defendant argues that the trial court erred in holding that he was not denied the effective assistance of counsel. Defendant contends that both Longstreet and Slameka were ineffective in failing to communicate DeYong's plea offers.

Whether a person has been denied the effective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review the trial court's findings of fact for clear error, while its constitutional determinations are reviewed de novo. *People v Johnson*, 293 Mich App 79, 90; 808 NW2d 815 (2011). A finding is clearly erroneous when we are left with "a definite and firm conviction that a mistake has been made." *People v Mullen*, 282 Mich App 14, 22; 762 NW2d 170 (2008).

To establish a claim for ineffective assistance of counsel, a defendant must satisfy the two-part test articulated in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). First, the defendant must establish that "counsel's representation fell below an objective standard of reasonableness." *People v Vaughn*, 491 Mich 642, 669; 821 NW2d 288 (2012). Second, the defendant must show that trial counsel's deficient performance prejudiced his defense. *Strickland*, 466 US at 687. To demonstrate prejudice, a defendant must show the existence of a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Vaughn*, 691 Mich at 669.

A defendant has a Sixth Amendment right to counsel, which extends to the plea-bargaining process. *Lafler v Cooper*, __ US __; 132 S Ct 1376, 1384; 182 L Ed 2d 398 (2012). See also, *Burt v Titlow*, ___ US ___; 134 S Ct 10; 187 L Ed 2d 348 (2013). A trial counsel's assistance must enable the defendant to make an informed and voluntary choice between trial and a guilty plea. *People v Corteway*, 212 Mich App 442, 446; 538 NW2d 60 (1995), lv den 453 Mich 864 (1996). A defendant's trial counsel must explain to the defendant "the range and consequences of available choices in sufficient detail to enable the defendant to make an intelligent and informed choice." *People v Jackson*, 203 Mich App 607, 614; 513 NW2d 206 (1994), lv den 445 Mich 879 (1994). "In the context of pleas a defendant must show the outcome of the plea process would have been different with competent advice." *Lafler*, 132 S Ct

at 1384. Furthermore, in a circumstance in which a defendant rejects a plea offer based on ineffective assistance of counsel:

> a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (*i.e.*, that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed. [*Id.* at 1385.]

Although a claim of ineffective assistance of counsel may be based on counsel's failure to communicate a plea offer, defendant must prove by a preponderance of the evidence that a plea offer was made and that his counsel failed to communicate to him. *People v Williams*, 171 Mich App 234, 242; 429 NW2d 649 (1988).

Defendant has failed to show that Longstreet's representation fell below an objective standard of reasonableness. Longstreet testified that there was a plea offer from the prosecutor. While Longstreet did not have "any specific independent recollection of informing" defendant of the plea offer, she explained that she would have had no reason not to inform defendant about the plea offer. DeYong testified that she spoke with Longstreet and "indicated to her that she should let me know if she's interested in an offer," but that Longstreet later informed her that defendant was not interested in a plea offer. On the other hand, defendant testified that he informed Longstreet that he was willing to accept a plea offer.

However, the trial court determined that defendant was not credible and found that defendant informed Longstreet that he was not interested in a plea bargain. Slameka's testimony that defendant was adamant about going to trial supported the inference that defendant told Longstreet that he was not interested in a plea offer, as well as defendant's assertion of innocence at sentencing. We will not interfere with the trial court's determination regarding the credibility of the witnesses; instead, we defer to the trial court's special opportunity to judge the credibility of witnesses presented at a *Ginther* hearing. *People v Dendel*, 481 Mich 114, 130; 748 NW2d 859 (2008), modified 481 Mich 1201 (2008); MCR 2.613 (C). Accordingly, we cannot find that the trial court clearly erred in concluding that Longstreet's performance did not fall below an objective standard of reasonableness.[2]

[2] While the trial court did not clearly err in its factual basis for finding that Longstreet's performance did not fall below an objective standard of reasonableness, we are troubled by many aspects of her representation of defendant. We are concerned that counsel could not recall the specifics of any plea offer, apparently did not keep or maintain notes about plea negotiations, and did not engage in a discussion with defendant about possible sentence outcomes if he was convicted. These findings also characterize Slameka's representation of defendant prior to trial. However, defendant has failed to present enough evidence to overcome the strong presumption in *Strickland*, because, as more fully discussed below, the record evidence supports the trial

Similarly, the trial court did not clearly err in finding that Slameka's representation met an objective standard of reasonableness. Slameka testified at the *Ginther* hearing that he spoke with the prosecutor twice and that she made a plea offer, but that he could not remember the specifics of the offer. Slameka testified that he and the prosecutor discussed the offer outside the courtroom in the defendant's presence. According to Slameka, defendant repeatedly stated that he was innocent and that under no circumstances would he plead guilty. While defendant's testimony conflicted with Slameka's testimony, the trial court found Slameka was more credible and that defendant was not credible. We are not left with a definite and firm conviction that the trial court made a mistake in weighing the credibility of the witnesses in this case. As noted above, we will not interfere with the trial court's credibility determination and instead we defer to the trial court's special opportunity to judge the credibility of witnesses presented at a *Ginther* hearing. *Dendel*, 481 Mich at 130; MCR 2.613 (C). In short, defendant has not established that Slameka's representation fell below an objective standard of reasonableness. *Vaughn*, 491 Mich at 669.

Moreover, the record evidence supports the trial court's determination that defendant would not have accepted a plea offer irrespective of counsel's performance. Slameka testified that defendant insisted he was innocent and that "under no circumstances" would he accept a plea offer. Additionally, defendant's testimony at the *Ginther* hearing showed that he was prepared to go to trial and accept the risk of a guilty verdict. Defendant testified that he told his "baby girl" that his guidelines were so low, that he was not going to be sentenced to life imprisonment, and that he would be "damned if [he was sentenced to] anymore than three." Further, defendant had a defense prepared for trial that involved family members testifying that they had given him money for his unpaid rent, undermining the prosecution's theory that defendant had motive to commit the robberies. In short, Slameka's testimony coupled with defendant's testimony that he was expecting to receive a minimal sentence, the fact that defendant had a defense prepared for trial, and defendant's assertion of innocence following conviction, supported the trial court's conclusion that defendant would not have accepted a plea bargain. Defendant has not shown that he was denied the effective assistance of counsel. *Vaughn*, 691 Mich at 669, citing *Strickland*, 466 US at 694.

Defendant also argues that Slameka was ineffective for failing to call alibi witnesses at trial. Defendant did not preserve this issue for review because he did not move for a *Ginther* hearing on the same basis; accordingly, our review is for errors apparent on the record. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). Failure to call a witness or present evidence can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). A substantial defense is one that might have made a

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court's finding that defendant would not have accepted a plea offer irrespective of counsel's performance. It is primarily for this reason that we concur with the trial court. However, we expressly leave open the question of whether similar conduct by counsel with a client who has not spurned any and all plea offers constitutes ineffective assistance of counsel.

difference in the outcome of the trial. *People v Chapo*, 283 Mich App 360, 371; 770 NW2d 68 (2009).

Here, defendant cannot show that the failure to call the two witnesses deprived him of a substantial defense. Defendant fails to offer any description of what the witnesses would have testified to and he does not explain how the testimony would have had any impact at trial. Simply stated, this Court has nothing on which to base a finding as to what the two witnesses would have testified to at trial. In the absence of any proffered evidence, we cannot make any findings as to how, if, or why defendant was denied a substantial defense. In the complete absence of any evidence, defendant cannot show that counsel was ineffective in failing to call the witnesses.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Stephen L. Borrello
/s/ Deborah A. Servitto